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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. 663

RUTH MATTHEWS, ET VIR, *Petitioners*

VS.

SOUTHERN PACIFIC COMPANY, SUCCESSOR AND ASSIGN OF TEXAS AND NEW ORLEANS RAILROAD COMPANY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Ruth Matthews and husband, L. D. Matthews, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on August 5, 1964.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit (App. A, infra, pp. 17-23) is unreported.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit reversing the District Court for the Eastern District of Texas was entered on the 5th day of August, 1964 (App. B, infra, pp. 24-25). A petition for rehearing, timely filed, was denied on September 24, 1964 (App. B, infra, p. 26). The jurisdiction of this Court is invoked under 28 U.S.C.1254 (1).

QUESTION PRESENTED

Were petitioners deprived of their right to a trial by jury, as guaranteed by the Seventh Amendment to the Constitution of the United States, when the Court of Appeals for the Fifth Circuit re-examined the facts otherwise than according to the rules of the common law, made affirmative finding of material facts contrary to the jury's failure to find, and, based upon such findings, reversed the judgment of the trial court that had been entered in conformity with the jury verdict, and ordered a judgment notwithstanding the verdict be entered in conformity with the findings of the Court of Appeals?

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment to the Constitution of the United States provides in pertinent part as follows:

> "* * * The right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

This is a railroad crossing accident case. The petitioners, husband and wife, sued the respondent railroad company for personal injuries sustained by petitioners in a collision between an automobile driven by petitioner L. D. Matthews, in which his wife, petitioner Ruth Matthews, was riding, and a coal car connected to fourteen other coal cars (R. 24, 230, 554), which were being pushed across a public crossing (R. 25), within the city limits of the City of Tenaha, Texas, (R. 25), by an engine operated by respondent's employees. The accident occurred on March 14, 1962, at approximately 1:30 p.m. (R. 5) when the petitioner L. D. Matthews attempted to drive his automobile across the railroad crossing. The weather was cold and a drizzle of rain was falling, with a little sleet and a little snow (R. 72). At the time of the accident and immediately prior to said accident the windows on petitioners' automobile were rolled up (R. 72) and the windshield wipers were working (R. 72); the heater and defroster were on (R. 73), with the visibility out the front windshield being unobstructed (R. 73). There was no flagman at the crossing at the time of the accident to warn traffic that railroad cars were about to be pushed across the crossing (R. 25), nor was there a mechanical warning device located at the crossing at the time of this accident (R. 25), nor was the bell on the engine that was pushing the coal cars across the public railroad crossing ringing (R. 69, 70, 167, 184, 215, 216, 237, 238, 246, 247, 249, 250).

Petitioner L. D. Matthews, returning to his home with his wife, turned the 1959 Buick automobile he was driving right off of U.S. Highway 84 onto Menefee Street, a sand

street that crosses over respondent's tracks (R. 57-58), with the railroad crossing in the direction in which the petitioners were traveling being elevated above the street a little over 4 feet (R. 62), the point of incline beginning approximately 15 feet from the crossing (R. 62). That as the petitioner L. D. Matthews approached the railroad crossing, and being approximately 75 feet from same, he looked both to his left and to his right, but his view of the tracks to the right of the crossing was obstructed by permanent obstructions (R. 74, 76, 79-80). Not seeing or being warned of the approaching coal cars, the petitioner L. D. Matthews proceeded toward the crossing driving at a very slow rate of speed (R. 76), looking to his left and to his right again when he was approximately 35 feet from the crossing, with his view of the respondent's tracks to the right of the crossing still being blocked or obstructed by permanent obstructions (R. 76, 81-82). Continuing toward the crossing, petitioner L. D. Matthews looked a third time to his right and to his left when he was approximately 15 feet from the crossing (R. 84, 89) and saw no train. Petitioner L. D. Matthews was able to see down the crossing at this point by looking out his windshield (R. 90) approximately 40 to 50 feet (R. 89) but his view was obstructed further because of the old junk cars (R. 256), the elevated railroad dump, the top of his car, his head being high up in the car, and the bushes along respondent's track (R. 90, 99-100). After witnessing no train when approximately 15 feet from the crossing, the petitioner proceeded upon the track (R. 91) without first bringing the automobile to a stop, until petitioner Ruth Matthews screamed "train", at which time petitioners' automobile was right across the first set of respondent's railroad tracks

(R. 93). Petitioner L. D. Matthews then slammed on his brakes and saw a coal car approaching approximately eight feet away.

There is no dispute that petitioners were injured when their car was struck by respondent's train, nor was there any dispute about the fact that petitioners did not stop within the prescribed distance of respondent's tracks, as is designated by the Texas Crossing Statute (Article 6701d, Section 86d, Vernon's Revised Civil Statutes of Texas - see Appendix, infra, C). At the close of the petitioners' case, and again at the close of the evidence, the respondent moved for an instructed verdict based on the grounds that the petitioners were guilty of contributory negligence, as a matter of law. Both of said motions were overruled by the trial court and the case was submitted to the jury on a general charge (R. 327, 512). The jury returned a general verdict in favor of petitioners in the amount of $10,000.00 (R. 26). Based upon the verdict of the jury, the trial court entered judgment for the petitioners in conformity with said verdict. Respondent perfected its appeal to the Court of Appeals for the Fifth Circuit and in an opinion by said Court, on the 5th day of August, 1964, the judgment of the trial court was reversed and the case was ordered remanded for the entry of a judgment notwithstanding the verdict. The Court of Appeals made two findings of facts necessary to support its orders: First, that the petitioner L. D. Matthews *did not look* to see whether a train was approaching as he approached the respondent's crossing (R. 550, 552); and, Second, that petitioner L. D. Matthew's action in not stopping within the area designated in Article 6701d, Section 86d, before attempting to cross respondent's tracks was a proximate cause of the petitioners'

injuries and damages, even though the jury had failed to make such findings and such action of the jury being supported by evidence of probative force (R. 73-76, 99,100). Petitioners timely filed a petition for rehearing (R. 554-559) with the Court of Appeals for the Fifth Circuit pointing out to the Court of Appeals that in making such a finding of facts as it did, ordering the judgment of the trial court reversed, and judgment entered notwithstanding the verdict, was a violation of petitioners' constitutional rights of a trial by jury, as guaranteed by the Seventh Amendment to the Constitution of the United States. Further, that the action of the Court of Appeals in re-examining the facts as tried by the jury other than according to the rules of common law was strictly prohibited by the Seventh Amendment to the Constitution of the United States.

The petition of the petitioners for rehearing was denied by the Court of Appeals for the Fifth Circuit on the 24th day of September, 1964 (R. 578), and it is from the action of the Court of Appeals in reversing the judgment of the trial court and the denial of petitioners' right to a trial by jury that this petition for writ of certiorari is presented.

REASONS FOR GRANTING THE WRIT

I.

The Texas Crossing Statute (App. C, infra) provides that a motorist, when approaching a railroad crossing, must stop within 50 feet and no less than 15 feet from the nearest rail of such railroad crossing when a train is plainly visible and is in hazardous proximity to the crossing. However, our Texas Supreme Court has ruled, in *Missouri-*

Kansas & Texas Railroad Company v. McFerrin, 291 S.W. 2d 931, Texas Supreme Court, 1957, that there is no statutory duty on the part of a motorist approaching a railroad crossing to stop within any prescribed area unless a reasonably prudent man situated as was the motorist would have seen the train if he had looked. The jury in the case for which this writ of certiorari is presented found, by returning a general verdict for the petitioners, in fact, that the petitioner, L. D. Matthews, when approaching the crossing, looked for the train, and that a reasonably prudent man, situated as was the petitioner L. D. Matthews, would not have seen the train. In complete disregard for such finding by the jury, the Court of Appeals for the Fifth Circuit re-examined the facts, and, on page 21 of its opinion (App. A, infra) found that "had L. D. Matthews looked as the law required, he would have seen the approaching train in time to have stopped before reaching the tracks," and that his action in failing to look constituted contributory negligence as a matter of law precluding recovery. This was a substitution by the Court of Appeals for the Fifth Circuit of its finding of fact that petitioner L. D. Matthews did not look, in place of the jury's failure to find, thereby depriving your petitioners of their right of trial by jury. For the Court of Appeals to find that petitioner L. D. Matthews did not look, it first had to find that the physical facts, as disputed by both the respondent and petitioners, were at variance with the testimony of the petitioners. That, the physical facts being at variance with petitioners' testimony, petitioners' testimony that he looked, amounted to no evidence. To find that the physical facts existing at the time of the accident were at variance with the testimony of

petitioner L. D. Matthews, the Court of Appeals had to re-examine the entire evidence and believe the disputed testimony of the respondent concerning the physical facts. The Court of Appeals, in re-examining the testimony, made itself a jury, believed the testimony of the respondent, respondent's witnesses and exhibits, and disbelieved the testimony of the petitioners, petitioners' witnesses and exhibits. The jury that had the opportunity to hear the testimony of all witnesses as to what the physical facts were at the time of the accident believed the testimony of the petitioners, petitioners' witnesses and exhibits, and rendered a general verdict for the petitioners; and, the jury having found the conflicting testimony as to physical facts for the petitioners, and said finding being supported by evidence of probative force, the Court of Appeals cannot re-examine the evidence and find the facts otherwise. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 82 S.Ct. 780, 369 U.S. 355, 7 L.Ed2d 789. United States Courts of Appeal cannot disturb a jury verdict based upon conflicting evidence. *Atlantic Greyhound Corporation v. Lyon, et al*, 107 F.2d 157, Certiorari Denied, 60 S.Ct. 592; *Mutual Benefit Health & Accident Ass'n. v. Bowman*, 99 F.2d 856, Certiorari Denied, 59 S.Ct. 485.

This is not a case of no evidence to support the jury's finding, but is rather a case of the Court of Appeals saying that the physical facts do not support the jury's findings, since the physical facts as found by the Court of Appeals, but not by the jury, are in conflict with the testimony of the petitioner. The physical facts that existed at the time of the accident concerning the respondent's crossing, the obstructions around said crossing, the road leading up to

said crossing, the elevation of the respondent's tracks, the weather conditions at the time of the accident, the visibility at the time of the accident, the height of respondent's train, the general lay of the ground surrounding said crossing, and the distance a motorist could see down the respondent's tracks as he approached respondent's crossing, were not before the trial court or the Court of Appeals, only the disputed testimony as to what the physical facts were. The testimony of what the physical facts were was established by testimony of witnesses and exhibits of both respondent and petitioners—the petitioners testifying and introducing exhibits that the physical facts were one way, and the respondent presenting testimony and introducing exhibits that the physical facts were another way. What the physical facts actually were at the time of the accident was an ultimate and material question for the jury to determine. Had there been no dispute as to what the physical facts were, then the Court of Appeals could find under the substantive law that the testimony of the witnesses that conflicted with the admitted physical facts amounted to no evidence; but, when the physical facts are disputed by testimony, then it becomes a substantive right of the litigants to have the facts determined by a jury. The jury having found the physical facts in favor of petitioners, and making no finding as to negligence or proximate cause on the part of petitioners, the Court of Appeals cannot re-examine and determine the facts to be opposite than that determined by the jury. By so doing, the Court of Appeals deprived petitioners of their substantive right to a trial by jury.

In *Gunning v. Cooley*, 281 U.S. 90, 50 S.Ct. 231, 74 L.Ed. 720, this Honorable Court stated that issues which

depend on the credibility of witnesses and the effect or weight of evidence are to be decided by the jury. Where uncertainty as to the facts arises from a conflict in the testimony, or because, the facts being disputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but is a fact to be decided by the jury.

The decision of the Court of Appeals for the Fifth Circuit is squarely in conflict with this Honorable Court's decision in *Parsons v. Bedford*, 3 Pet. 433, 7 L.Ed. 732, and in *Lillian Slocum v. New York Life Insurance Company*, 228 U.S. 364, 33 S.Ct. 523, 57 L.Ed. 879. In the Slocum case, supra, the trial court returned a general verdict for the plaintiffs, and the Circuit Court of Appeals, concluding that the evidence was not sufficient to sustain the verdict reversed the case and directed a judgment for defendant. The two questions before the Court were:

1. Whether the Circuit Court of Appeals erred in reversing the judgment; and 2. Did the Circuit Court of Appeals err in not granting a new trial instead of directing judgment for defendant notwithstanding the verdict for the plaintiff?

Justice Van Devanter, in delivering the opinion of the Court, stated that the real question was whether, in the direction given by the Circuit Court of Appeals, there was an infraction of the Seventh Amendment to the Constitution of the United States which guaranteed that "no fact tried by a jury shall otherwise be reexamined in any Court of the United States, than according to the rules of common law." The Court in reversing the actions of the Circuit Court of Appeals, in its opinion, stated:

> "The Constitution of the United States, as originally adopted, conferred upon this Court by Article 3, Section 2, Appellate Jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make; but this and the absence of any provision respecting the mode of trial in civil actions were so generally regarded as endangering the right of trial by jury as existing at common law, and invoked such criticism on that ground, that the First Congress proposed to the Legislatures of the several states the Seventh Amendment; which was promptly ratified. Now according to the rules of the common law, the facts once tried by a jury are never reexamined unless a new trial is granted in the discretion of the Court before which the suit is pending, for good cause shown; or unless the judgment of such Court is reversed by a superior tribunal, on a writ of error, and a venire facias de novo is awarded."

In the Parsons case, supra, decided in 1830, this Honorable Court said that when interpreting that portion of the Seventh Amendment wherein it is provided that "no fact tried by jury shall be otherwise reexamined in any Court of the United States, than according to the rules of common law", that this clause "is a prohibition to the Courts of the United States to reexamine any facts tried by a jury in any other manner. The only modes known to the common law to reexamine such facts are the granting of a new trial by the Court where the issue was tried or to which the record was properly returnable; or the award of a venire facias de novo by appellate court for some error of law which intervened in the proceedings. This requires that the questions of fact in common law actions shall be settled by the jury and that the Court shall not assume directly or indirectly to take from the jury or to itself

such prerogative. It must, therefore, be taken as established by virtue of the Seventh Amendment of the Constitution that either party to any action at law * * * has the right to a trial by jury; that when a trial by jury has been had in an action at law, in a court either of the United States or of a State, the facts there tried and decided cannot be reexamined in any court of the United States otherwise than according to the rules of common law of England.

In the trial by jury, the right to which is secured by the Seventh Amendment, both the Court and the jury are essential factors. To the former is committed the power and direction of superintendents and to the latter, the ultimate determination of the issues of fact. Only through the cooperation of the two, each acting within its appropriate sphere, can a constitutional right be satisfied. And so, to dispense with either, or to permit one to disregard the province of the other, is to impinge on that right."

The Court of Appeals for the Fifth Circuit, in finding the physical facts contrary to the findings of the jury, is usurping the right of the jury to determine the credibility of the witnesses, the exhibits and the weight to be given their testimony. Such action of the Court of Appeals for the Fifth Circuit is a usurpation of the sphere designated for the jury, and by reason of such, petitioners' constitutional right has not been satisfied. The right of a trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States is a substantive right that is not to be infringed upon, and if the action of the Court of Appeals for the Fifth Circuit is allowed to stand, then no litigant's right to a trial by jury shall remain inviolate.

II.

The Court of Appeals for the Fifth Circuit not only re-examined the facts contrary to the Seventh Amendment to the Constitution of the United States and found petitioners guilty of contributory negligence as a matter of law, but also impliedly found, in order to properly reach its decision, that such contributory negligence was a proximate cause of the accident made the basis of this suit, in further violation of petitioner's guaranteed right of trial by jury. The jury made no such finding of proximate cause, and to prevent the petitioners' recovery, not only must there have been a finding that the petitioners were guilty of contributory negligence as a matter of law in failing to stop within the prescribed area designated by the Texas Crossing Statute, but there must also have been a finding that such negligence was a proximate cause of the accident. The Court of Appeals for the Fifth Circuit, by reversing and remanding for the entry of judgment notwithstanding the verdict, made both such ultimate findings, for under our Texas substantive law, the fact that an act amounts to negligence per se is not in itself enough to prevent the party committing the negligent act from recovering. The negligent act must be a proximate cause and the burden is on the respondent to secure such a finding since it is an affirmative defense. The jury in this case found by returning a general verdict for the petitioners that said petitioners were not guilty of contributory negligence proximately causing their injuries and damages. The Court of Appeals for the Fifth Circuit found that the petitioners were guilty of contributory negligence but made no mention as to whether or not such contributory negligence on the part of petitioners was a proximate cause of the injuries and damages sustained by petitioners; how-

ever, the Court of Appeals would have had to make such findings to reach the results obtained. If the Court of Appeals for the Fifth Circuit made no such finding as to proximate cause on the part of petitioners and only found that petitioners were guilty of contributory negligence as a matter of law, petitioners were still entitled to recover against respondent under the findings by the jury, since not only did the jury find that the acts of respondent amounted to negligence proximately causing the accident, but also the Court of Appeals for the Fifth Circuit stated in its opinion (App. A, infra, p. 18), that "the negligence of the railroad is not questioned". Negligence per se under our Texas substantive law does not prevent the party committing the negligent act from recovering when there is no finding that the negligent act, regardless of whether such negligence amounts to negligence per se or not, was a proximate cause. *Jenkins v. Hennigan*, 298 S.W.2d 905 E.R., N.R.E.; *East Texas Motor Freight Lines v. Loftis*, 223 S.W.2d 613, S.Ct. of Texas (1949); *Little Rock Furniture Mfg. Co. v. Dunn*, 222 S.W.2d 985, S.Ct. of Texas (1949).

If petitioners were to agree that there was no evidence that petitioner L.D. Matthews looked before attempting to cross respondent's tracks, as found by the Court of Appeals for the Fifth Circuit but not by the jury, thereby rendering petitioners guilty of contributory negligence as a matter of law, still the essential finding to defeat petitioners' recovery is lacking. *The negligence per se must be a proximate cause.* Negligence of any form, per se or otherwise, without a finding that such negligence was a proximate cause of the accident made the basis of the suit, is of no value, and a judgment cannot be rendered against the party that committed the negligent act or was guilty of contributory negligence as a matter of law in absence of

such a finding. The Court of Appeals in holding (App. A, infra, p. 23) that petitioner L. D. Matthews being guilty of contributory negligence as a matter of law presented "no proper issue for the jury and the motion for a judgment notwithstanding the verdict should have been granted" is clearly wrong under Texas law. *Jenkins v. Hennigan,* supra; *East Texas Motor Freight Lines v. Loftis,* supra; *Little Rock Furniture Mfg. Co. v. Dunn,* supra. In 34 Texas Law Review 971, Chief Justice Calvert of the Texas Supreme Court in properly presenting the special issues to be decided by the jury under Article 6701d, Section 86, said where it is found that the motorist did not stop in the statutory area "a conditional issue on proximate cause should be submitted". It was further noted by Justice Calvert that "the Courts of this state have adopted and followed the general rule that violation of a statutory duty is negligence per se and that once the violation is established the only added finding necessary to establish a defendant's liability (or to bar a claim if the violation be by a plaintiff) is that the violation of the statutory duty was a proximate cause of the plaintiff's injuries." Even if petitioner L. D. Matthews was guilty of contributory negligence, whether or not such contributory negligence was a proximate cause of the accident was a proper issue for the jury, and was an essential fact for the jury to decide. Texas Law Review, supra. The jury, by returning a general verdict for petitioners, resolved that even if petitioners did violate Article 6701d, Section 86 (App. C, infra, p. 27), such contributory negligence was not a proximate cause of petitioners' injuries and damages or of the cause of action made the basis of this suit.

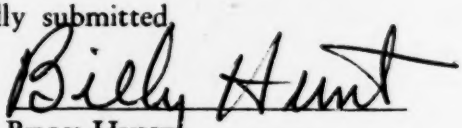
The Court of Appeals for the Fifth Circuit not only ruled contrary to the substantive law of the State of

Texas, but, in reversing and ordering judgment entered notwithstanding the verdict, found in fact in complete absence of a finding by the jury that not only was petitioner L. D. Matthews guilty of contributory negligence but that such contributory negligence was a proximate cause of the accident and petitioners' injuries and damages. Such findings by the Court of Appeals violated petitioners' constitutional right to have both ultimate facts decided by a jury, and not by the Court of Appeals.

CONCLUSION

WHEREFORE, in order to protect the petitioners' right of trial by jury, as guaranteed by the Seventh Amendment to the Constitution of the United States of America, resolve the conflict between the early decisions of this Honorable Court and the present decision of the Court of Appeals for the Fifth Circuit, and to correctly render a decision in conformity with the Texas substantive law, this petition for writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 20988

SOUTHERN PACIFIC COMPANY, Successor and Assign of TEXAS AND NEW ORLEANS RAILROAD COMPANY, *Appellant*,

versus

RUTH MATTHEWS, ET VIR, *Appellees*.

Appeal from the United States District Court for the Eastern District of Texas.

(August 5, 1964)

Before HUTCHESON, PRETTYMAN and JONES, Circuit Judges.

JONES, Circuit Judge: Ruth Matthews and her husband, L. D. Matthews, recovered judgment against the appellant railroad company for personal injuries sustained when a train of the appellant struck an automobile, driven by L. D. Matthews in which his wife, Ruth Matthews, was a passenger, at a grade crossing in the town of Tenaha, Texas. The car was struck on the right side by a train composed of freight cars backing over the crossing. Ruth Matthews was sitting on the right of the front seat and was injured. The negligence of the railroad is not ques-

tioned. The only issue on this appeal is whether the evidence required a finding that L. D. Matthews was guilty of contributory negligence so as to preclude recovery by either Matthews or his wife, it being the law of Texas that contributory negligence defeats recovery and the negligence of the husband driver is imputed to the wife passenger. 40 Tex. Jur. 2d 639, Negligence § 122.

The railroad directs our attention to the Texas statute which provides:

> "Whenever any person driving a vehicle approaches a railroad grade crossing the driver of such vehicle shall stop within fifty (50) feet but not less than fifteen (15) feet from the nearest rail of such railroad and shall not proceed until he can do so safely when: . . .
>
> "(d) An approaching train is plainly visible and is in hazardous proximity to such crossing." Vernon's Rev. Civ. Stat. Art. 6701d, § 86.

A violation of this statute constitutes contributory negligence as a matter of law. Missouri-Kansas-Texas R.R. Co. v. McFerrin, 156 Tex. 69, 291 S.W.2d 931. However, the Texas Supreme Court, in the McFerrin case, decided that whether the train is "plainly visible" and in "hazardous proximity" must be determined by the "common-law test of the reasonably prudent man." Missouri-Kansas-Texas R.R. Co. v. McFerrin, 291 S.W.2d 931, 939. There is no question in this case that the train was in hazardous proximity to the crossing, and it is undisputed that the appellees did not stop. The issue for our resolution, therefore, is whether we can say, as a matter of law, that the train would have been "plainly visible" to a reasonably prudent man. In addition, the appellant argues that the

appellees breached, as a matter of law, a common law duty of reasonable care in failing to see the train which was plainly visible, but we find no necessity of considering this point.

The controlling fact question was whether the view of L. D. Matthews was obstructed so as to prevent him from seeing the train. The controlling question of law is whether the evidence on that fact question was such as to sustain the finding, implicit in the jury verdict, that there was an obstruction of the view. If this question be decided for the railroad then its motion for a judgment notwithstanding the verdict should have been granted.

Just prior to the accident, L. D. Matthews turned off a primary highway onto an unpaved road known as Menefee Street. The crossing where he met the train is on this street between the highway and his home. He was familiar with the crossing. The railroad was elevated approximately four feet above the elevation of the street at the approach to the crossing. The street ran north and south and the Matthews car was traveling north. The track ran east and west and the train which struck the Matthews car was moving west. There was a house, referred to as the Parker house, thirty feet from and east of the street and 170 feet from and south of the crossing. Between the house and the track were some trees, a junked trailer and three junked cars. Nineteen feet from the crossing there was a railroad warning cross which was not equipped with warning lights.

The train consisted of fifteen cars and a caboose being pushed by an engine. The first railway car to reach the crossing, and consequently the one which struck appellees' car, was a gondola. The estimates of the speed of the train ranged from six to twenty miles an hour. It had rounded

a curve 740 feet from the crossing and was traveling down a straightaway, into Tenaha. There was a lookout sitting on the gondola. The engineer did not blow the whistle nor did he ring the bell as he approached the crossing.

L. D. Matthews testified that as he turned onto Menefee Street leading to the crossing he was traveling between eight and ten miles an hour. It was, according to his testimony, a cold day with drizzling rain, a little sleet and a little snow. The windows in the car were rolled up and the heater and defroster were on. Both windshield wipers were working and visibility out the front was unobstructed. There was no evidence that the right front seat window was fogged up, or that there was any obstruction there. He testified that he looked to his left and right three times before driving onto the track. The first time he looked he was approximately seventy-five feet from the track and he failed to see a train. His view was obstructed, he testified, by the house, the old wrecks behind the house, and some sweet gum bushes. At one point in his testimony he estimated the height of the bushes to have been between fifteen and twenty feet, and at another point to have been between twenty-five and thirty feet high. The second time he looked, still traveling between eight and ten miles an hour, he testified that he was about thirty-five feet from the track and again the sweet gum bushes and the old junked cars obstructed his view. He also testified that a chicken house was behind the main house, as well as two trees.

The third time appellee looked, he testified that he was not traveling over four miles an hour and was approximately fifteen feet from the crossing. He testified

that he could see thirty, forty, fifty feet down the track but saw no train and hence proceeded onto the track. There are two tracks crossing Menefee Street at this point. The train was on the south track, or the one nearest the appellees' car as they approached. As the car came upon the south track, Mrs. Matthews screamed "Train" Mr. Matthews stopped, not realizing where the train was. When he saw it, it was eight feet from him. His motor having stalled, there was no way that he could avoid the collision.

L. D. Matthews testified that the bushes were fifty feet from the road along the right of way. When he looked the last time he could not see them because, he said, the car was in a low position just before ascending the raised crossing. Also he had his head up against the top of the car when he looked, in an attempt to get a better view of the tracks. He testified that he could see out of the window but saw no train.

The appellant's witnesses testified to the absence of any obstruction to a view of the tracks from a vehicle approaching, as were the appellees, from the south on Menefee Street. The conflict thus created might normally result in a fact issue to be resolved by the verdict of a jury. But we can disregard the oral testimony of the witnesses for the railroad as to the location and character of obstructions and as to visibility down the track. Considering only the testimony of the appellees and their witnesses, and the undisputed proof as to the physical layout, the inescapable conclusion is that had L. D. Matthews looked, as the law required, he would have seen the approaching train in time to have stopped before reaching the tracks.

It was the testimony of L. D. Matthews that the junked automobiles and other obstructions were not closer than thirty to forty feet to the track. J. D. Parker, owner of the house and property south of the railroad and east of Menefee Street, was called as a witness for the appellees. It was his testimony that none of the junked automobiles or other obstructions were on the right of way of the railroad, thus placing the obstructions, by the testimony of this witness for the appellees, a distance of forty-five to fifty feet south of the track.

Mrs. Matthews testified that she looked to her right when they reached the bottom of the rise to go over the crossing and could not see the track because the bushes along the right of way were so thick. J. D. Parker testified to the thickness of the bushes at the time of the accident, and also testified that they were low bushes reaching a height of five feet at a distance of a hundred feet down the track. He testified that at a distance of twenty feet from the crossing a motorist could look to his right and see for a distance of 225 feet down the track. There was no other helpful testimony about obstruction to vision.

We have already noted that the level of the street, until within twelve to fifteen feet of the track, was four feet, more or less, lower than the crossing. The cars of the train were at least eight and perhaps ten or twelve feet above the elevation of the track. The appellant introduced a panoramic photograph which the cameraman testified was taken at a distance of fifty feet from the crossing. At this point there is a clear view of the track for at least 250 feet. In any event, at twenty feet from the track the photograph demonstrates what is clear from the testimony of Parker, that at this distance the appellees had a clear view

of that portion of the tracks on which the train was traveling. Testimony which is at variance with physical facts is no evidence. Deitz v. Greyhound Corporation, 5th Cir. 1956, 234 F. 2d 327, cert. den. 352 U.S. 918, 77 S.Ct. 218, 1 L.Ed. 2nd. 124; Geigy Chemical Corporation v. Allen, 5th Cir. 1955, 224 F. 2d 110; Humble Oil & Refining Co. v. Martin, Tex. 222 S.W.2d 995, 1002. There is no dispute that at the speed he was traveling, Mr. Matthews could have stopped within twenty feet. It was his testimony that he could have stopped within two or three feet.

The evidence was such as admits of no conclusion but that the approaching railway cars would have been plainly visible, prior to and at the time they were in hazardous proximity to the crossing, to a reasonably prudent man exercising ordinary care for his own safety. In other words, and we repeat, if Matthews had looked he must have seen the train in time to have stopped and avoided the collision. Thus, by failing to so stop within the statutory zone of fifty to fifteen feet, Matthews violated the statute and was guilty of contributory negligence as a matter of law. Lackey v. Gulf, C. & S. F. Ry. Co., Tex.Civ.App., 225 S.W.2d 630. There was no proper issue for the jury and the motion for a judgment notwithstanding the verdict should have been granted. Fort Worth & D. Ry. Co. v. Barlow, Tex.Civ.App., 263 S.W.2d 278; Bollinger v. Missouri-Kansas-Texas Railroad Co., Tex.Civ.App., 285 S.W.2d 300.

The judgment for the appellees is reversed and the cause is remanded for the entry of a judgment notwithstanding the verdict.

REVERSED AND REMANDED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1963

No. 20988

D. C. DOCKET NO. 3058 - CIVIL
SOUTHERN PACIFIC COMPANY, Successor and Assign of TEXAS AND NEW ORLEANS RAILROAD COMPANY, *Appellant*

versus

RUTH MATTHEWS, ET VIR, *Appellees*

Appeal from the United States District Court for the Eastern District of Texas.

Before HUTCHESON, PRETTYMAN*, and JONES, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby re-

manded to the said District Court for the entry of a judgment notwithstanding the verdict in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellees, Ruth Matthews, Et Vir, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

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*Senior Circuit Judge of the D. C. Circuit,
sitting by designation.

August 5, 1964

Issued as mandate:

Recoverable Costs:

Docketing cause, etc.	$ 25.00
Cost of Printing Record	1233.00
Total	$1258.00

APPENDIX "B"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

20988

SOUTHERN PACIFIC COMPANY, Successor and Assign of TEXAS and NEW ORLEANS RAILROAD COMPANY, *Appellant*,

vs.

RUTH MATTHEWS, ET VIR, *Appellees*

Appeal from the United States District Court for the Eastern District of Texas

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(September 24, 1964)

ON PETITION FOR REHEARING

Before HUTCHESON, PRETTYMAN* and JONES, Circuit Judges PER CURIAM

IT IS ORDERED That the petition for rehearing in the above entitled and numbered cause be, and it is hereby DENIED.

*Senior Circuit Judge of the District of Columbia Circuit, sitting by designation.

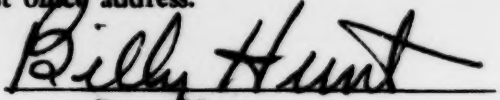
APPENDIX "C"

Texas Crossing Statute, Article 6701d, Sec. 86: (Vernon's Revised Civil Statutes of Texas)

> "§ 86. Whenever any person driving a vehicle approaches a railroad grade crossing the driver of such vehicle shall stop within fifty (50) feet but not less than fifteen (15) feet from the nearest rail of such railroad and shall not proceed until he can do so safely when: . . .
>
> "(d) An approaching train is plainly visible and is in hazardous proximity to such crossing."

CERTIFICATE OF SERVICE

The attorneys for respondent, McGregor, Sewell, Junell & Riggs, 1300 First City National Bank Building, Houston, Texas, have been mailed a copy of this petition for writ of certiorari at their post office address.



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